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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

GLENN A. HARRIS, Plaintiff and Respondent, v. RONALD K. ZIFF et al., Defendants and Appellants.	B259347 (Los Angeles County Super. Ct. No. BC535792)

APPEAL from an order of the Superior Court of Los Angeles County, Debre K. Weintraub, Judge. Affirmed.

Manning & Kass, Ellrod, Ramirez, Trester, Fredric W. Trester, Christopher A. Kanjo, Mark H. Herskovitz and Scott W. Davenport for Defendants and Appellants.

Howard M. Fields for Plaintiff and Respondent.

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INTRODUCTION

This is an appeal from an order denying a special motion to strike a malicious prosecution action pursuant to Code of Civil Procedure section 425.16, the anti-SLAPP statute.[1] Plaintiff Glenn Harris once served as corporate counsel for Stealth Aerospace, Inc. (Stealth). In an earlier action, a Stealth shareholder and former officer, Linda Glickstein, sued Harris, Stealth, and two other Stealth shareholders, asserting claims for fraud, breach of fiduciary duty, and negligent infliction of emotional distress stemming from her alleged " 'forced' retirement."[2] After Harris notified Stealth of the potential conflict created by Linda's action, Stealth's president instructed Harris to withdraw as corporate counsel. Following Harris's withdrawal, Linda dismissed her action.

Harris filed the instant action for malicious prosecution against Linda's attorneys, defendants Ronald Ziff, Hali Ziff, Maryanne Golsan and their law firm, Golsan, Ziff & Ziff (collectively, GZZ). GZZ moved to strike the complaint under the anti-SLAPP statute, arguing Harris could not establish a probability of success on the merits. The trial court denied the motion, concluding Harris's evidence showed GZZ lacked probable cause because it had neither a factual nor legally tenable basis to assert Harris owed Linda a legal duty in his capacity as Stealth's corporate counsel. We agree with the trial court's determination and affirm.

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[1] SLAPP is an acronym for "strategic lawsuits against public participation." Unless otherwise stated, further statutory references are to the Code of Civil Procedure.

[2] The two other shareholders named in the lawsuit were Baruch "Barry" Glickstein, Linda's former husband, and Alon Glickstein, Barry's son and Linda's stepson. For clarity we refer to the Glicksteins by their first names.

FACTS AND PROCEDURAL BACKGROUND[3]

Stealth is a distributor of electrical, electronic and electromechanical components for the airline and aerospace industry. Alon formed the company in 1995 as a California corporation. When Stealth's business operations commenced, Alon held one-third of the company's stock (70 shares), while Barry and Linda, who were then husband and wife, held the remaining two-thirds (140 shares) as tenants in common. Linda served as Stealth's president. Linda, Alon and Barry each served as directors on Stealth's board.

In February 2010, Barry and Linda executed a marital dissolution agreement. The agreement provided that each of Alon, Barry and Linda would hold an equal one-third interest in Stealth. In September 2010, Barry filed a petition for dissolution of his marriage to Linda. GZZ represented Linda in the dissolution proceedings.

On May 5, 2011, Linda sent an email announcing her retirement from Stealth, effective June 30, 2011. In a subsequent email sent on May 19, 2011, Linda expressed her "elation" at having "earned this milestone in [her] life," and confirmed that in mid-June she would send an "industry letter" announcing her retirement. On June 15, 2011, Linda sent another email expressing her frustration that her "retirement date [was] approaching," yet there had been no "negotiations for the buy out of [her] shares of the company." Linda's email requested a "meeting with the corporate attorney," noting it "would be great" if Barry and Alon were "willing to set this up to legalize the process." In advance of the requested meeting, Linda had a telephone conversation with attorney Michael Hackman, who had previously represented Stealth as corporate counsel.

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[3] Consistent with our standard of review, we state the facts in the light most favorable to Harris, as the plaintiff opposing GZZ's special motion to strike. "Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider 'the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based.' [Citation.] However, we neither 'weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law.' " (*Soukup v. Law Offices of Herbert Hafif* (2006) 39 Cal.4th 260, 269, fn. 3 (*Soukup*).)

In response to Linda's request, on June 16, 2011, the Stealth board of directors held a special meeting. Linda, Barry and Alon attended in person. Harris also attended the meeting. Under the heading "**LEGAL REPRESENTATION OF THE CORPORATION**," the minutes of the special meeting state the following:

> "There followed a discussion of the prior legal representation of the Corporation. GLENN HARRIS, an attorney with the law firm, Law Office of Glenn A. Harris, explained the services offered by his firm. After discussion, upon motion duly made and seconded, the following resolution was adopted:
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> > "RESOLVED, that the Corporation's legal representation may be provided by the Law Office of Glenn A. Harris. The officers of the Corporation hereby are authorized to communicate with the Law Office of Glenn A. Harris and GLENN HARRIS with respect to the Corporation's legal matters."

The board further resolved that Linda would be on paid leave from June 16, 2011 to June 30, 2011 and that during this period Linda would be required to obtain prior written approval from Alon or Barry to "withdraw any money from any of the Corporation's bank accounts" or "spend any of the Corporation's money." Linda was also prohibited from making a written announcement of her retirement without prior approval. Additionally, the board resolved to cancel the 140 shares of stock held by Barry and Linda as tenants in common and to reissue 70 shares each to Barry and Linda as individuals. The resolution was consistent with the terms of the dissolution agreement Linda executed in February 2010. Linda signed a series of written resolutions consistent with the oral resolutions reflected in the special meeting minutes.

On June 24, 2011, Ronald Ziff sent a letter to Barry's counsel in the dissolution proceeding indicating that GZZ had advised Linda to revoke her resignation. Consistent with that advice, Linda sent an email to Barry and Alon later that day, stating, "I hereby revoke my resignation to retire."

In September 2011, Ronald Ziff initiated correspondence to Harris regarding GZZ's attempts to obtain discovery of Stealth records. In the course of those communications, Ziff made financial demands regarding funds he maintained Stealth owed to Linda, and suggested that if Stealth did not pay those funds, Barry would be forced to pay them as part of the divorce proceeding.

On September 20, 2011, Harris responded to GZZ with a letter on behalf of Stealth detailing alleged actions taken by Linda in violation of her fiduciary duties to the corporation. Those actions included making "false and damaging statements about [Stealth]" and "inaccurately describ[ing] the circumstances surrounding her retirement" to Stealth customers and vendors, and maintaining an automatic monthly withdrawal of approximately $697 from Stealth's bank account to pay for her personal automobile lease. In the letter, Harris reminded GZZ of his attorney-client relationship with Stealth, stating, "Stealth Aerospace is my client. I owe a duty only to Stealth Aerospace. Your threat . . . that anything unpaid by the corporation will be paid by Barry Glickstein as part of the divorce proceedings is irrelevant to my obligations to the corporation. My duty is not to Barry Glickstein. Further, your continued denial that the corporation is a separate legal entity from Barry Glickstein may fit the narrative you have apparently chosen for the divorce case, but it is inaccurate." The letter concluded with a demand that Linda "cease and desist from the conduct described in this letter."

On September 23, 2011, Harris sent GZZ a second cease and desist letter concerning Linda's use of corporate funds to pay for her personal automobile lease. The letter also addressed GZZ's demand that Barry, rather than Stealth, purchase Linda's shares of the corporation, a transaction contrary to the terms of the "Buy-Sell Agreement" Linda executed in connection with obtaining her interest in Stealth.[4] With respect to that demand, Harris reiterated, "I represent Stealth Aerospace in corporate matters. I do not

[4] The agreement requires a shareholder, upon termination of his or her employment with Stealth, to "sell his or her shares to the Corporation according to the terms of this agreement." Those terms provide for an appraisal and a procedure for choosing an appraiser to value the shares.

represent any of the three owners of the corporation as individuals." Harris continued, "For months now, you and I have discussed the potential purchase by the corporation of [Linda's] interests . . . . Three days ago, for the first time, you stated that you want Barry to purchase Linda's shares. If you would prefer to negotiate with Barry Glickstein, please contact his counsel . . . . If you are negotiating with Stealth Aerospace, then you and I should continue our efforts."

On October 20, 2011, the Stealth board of directors held a special meeting. The minutes provided to the directors stated the following regarding corporate counsel's duty: " 'In light of the divorce litigation between LINDA GLICKSTEIN and BARRY GLICKSTEIN, and potential litigation involving the Corporation, Corporate counsel, GLENN HARRIS, again clarified that he represents the Corporation and not any of its shareholders/directors as individuals.' "

On October 25, 2011, Harris requested assurances through Linda's corporate attorney, Jonathon Feldman, that Linda would abide by her obligations under the Buy-Sell Agreement regarding the valuation and purchase of her Stealth shares. Linda did not provide the requested assurances. Stealth deemed this a repudiation of the agreement.

On November 9, 2011, Stealth filed a civil action against Linda seeking specific performance of the Buy-Sell Agreement and monetary damages for Linda's alleged embezzlement, breach of fiduciary duty, defamation, and interference with prospective economic advantage. Harris represented Stealth in the action; GZZ represented Linda. On January 10, 2012, GZZ filed an answer on Linda's behalf. Linda did not file a cross-complaint.

On April 12, 2013, Barry filed an action against Stealth, Alon and Linda, followed by a verified first amended complaint asserting 15 causes of action. As against Linda, the complaint sought specific performance of the Buy-Sell Agreement and other relief. Harris represented Stealth in the action. He did not represent any of the company's shareholders.

In response to Barry's complaint, on June 28, 2013, GZZ filed an answer and unverified cross-complaint on behalf of Linda against Barry, Alon, Stealth and Harris. The cross-complaint alleged Harris conspired with Stealth and the other cross-defendants to coerce Linda to sign the corporate resolution converting her jointly held ownership interest into separate property. Additionally, the cross-complaint asserted a claim for breach of fiduciary duty against Harris, alleging, "Linda is informed and believes that Glenn Harris owed a fiduciary duty to his client Stealth and as corporate counsel a duty to the shareholders . . . to treat them equally and without bias," which he purportedly breached by conspiring with the other cross-defendants. Finally, the cross-complaint asserted Harris and the other cross-defendants were liable for negligent infliction of emotional distress, having "caus[ed] Stealth to engage in such conduct, [which] was intended to completely break Linda financially and emotionally."

On July 12, 2013, Harris sent GZZ a letter demanding the immediate dismissal of the claims asserted against him in Linda's cross-complaint. Among other things, Harris insisted GZZ's failure to obtain permission from the court before filing a claim premised on his alleged civil conspiracy with Stealth violated Civil Code section 1714.10.[5]

Later the same day, Ronald Ziff responded to Harris's letter with a one-sentence email, stating, "Please advise whether or not as counsel for Stealth you have a legal duty of any kind owed to Linda as a director or shareholder of Stealth." Harris wrote back, reiterating, "my duty is to Stealth Aerospace - the corporate entity[;] I have consistently

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[5] Civil Code section 1714.10 provides in relevant part, "No cause of action against an attorney for a civil conspiracy with his or her client arising from any attempt to contest or compromise a claim or dispute, and which is based upon the attorney's representation of the client, shall be included in a complaint or other pleading unless the court enters an order allowing the pleading that includes the claim for civil conspiracy to be filed after the court determines that the party seeking to file the pleading has established that there is a reasonable probability that the party will prevail in the action." (*Id.*, subd. (a).) By its terms, section 1714.10 does "not apply to a cause of action against an attorney for a civil conspiracy with his or her client, where (1) the attorney has an independent legal duty to the plaintiff, or (2) the attorney's acts go beyond the performance of a professional duty to serve the client and involve a conspiracy to violate a legal duty in furtherance of the attorney's financial gain." (*Id.*, subd. (c).)

stated this verbally and in writing." After quoting from his September 23 letter—in which he stated, " 'I represent Stealth Aerospace in corporate matters[;] I do not represent any of the three owners of the corporation as individuals' "—Harris renewed his demand for immediate dismissal of the cross-complaint. (Bold and italics omitted.) Ziff responded moments later, "The question is about [¶] Linda as a director of the corporate entity Stealth[;] [¶] Linda as a shareholder of the corporate entity Stealth." Harris replied, stating once more, "I have never owed a legal duty to your client, Linda Glickstein, in any capacity. My duty has always been to the corporate entity, Stealth Aerospace." Harris concluded the communication with his demand that GZZ dismiss the claims stated against him in the cross-complaint. GZZ did not dismiss the claims.

Having been named as a co-defendant with Stealth in Linda's cross-complaint, Harris gave notice to Alon, Stealth's president, of a potential conflict of interests. In view of the conflict, Alon asked Harris to withdraw as Stealth's corporate counsel. On July 27, 2013, Harris filed a notice of dissociation as counsel for Stealth in all matters.

On September 12, 2013, two months after Harris's disassociation as Stealth's counsel, GZZ dismissed Linda's cross-complaint against Harris without prejudice. The parties did not exchange consideration for the voluntary dismissal.

On February 10, 2014, Harris filed the operative complaint against Linda and GZZ for malicious prosecution of Linda's cross-complaint. The complaint alleged GZZ prosecuted the cross-complaint against Harris maliciously and without probable cause "when they knew or should have known that [Harris] never owed any fiduciary duty to [Linda]." Harris sought damages stemming from his alleged forced withdrawal from representing Stealth.

On April 25, 2014, GZZ filed a special motion to strike Harris's complaint pursuant to the anti-SLAPP statute. To rebut the claim that it lacked probable cause, GZZ relied on Linda's verified answer to Barry's complaint, in which she alleged Harris " 'misrepresented that he was representing [Linda's] interests, concealing that he was representing the interests of Alon and/or Barry only.' " In his declaration in support of the anti-SLAPP motion, Ronald Ziff declared, "I have no information that any of the

declarations or verifications executed by Linda Glickstein in her dissolution proceeding or related actions were anything other than true." Harris opposed the motion with his own declaration and his several written communications to GZZ regarding his legal representation of Stealth.

On September 2, 2014, the court issued a tentative decision denying GZZ's motion to strike. The court determined GZZ lacked both a factual and legally tenable basis to conclude Harris owed Linda a legal duty. Accordingly, the court found GZZ maintained the claims for breach of fiduciary duty and negligent infliction of emotional distress without probable cause. After hearing argument from the parties, the court adopted the tentative decision as its final order denying the motion to strike.

DISCUSSION

1. *The Anti-SLAPP Statute and Standard of Review*

California's anti-SLAPP statute, section 425.16, provides a procedure for expeditiously resolving "nonmeritorious litigation meant to chill the valid exercise of the constitutional rights of freedom of speech and petition in connection with a public issue." (*Sipple v. Foundation for Nat. Progress* (1999) 71 Cal.App.4th 226, 235; § 425.16, subd. (a).) "Because these meritless lawsuits seek to deplete 'the defendant's energy' and drain 'his or her resources' [citation], the Legislature sought ' "to prevent SLAPPs by ending them early and without great cost to the SLAPP target." ' [Citation.] Section 425.16 therefore establishes a procedure where the trial court evaluates the merits of the lawsuit using a summary-judgment-like procedure at an early stage of the litigation." (*Varian Medical Systems, Inc. v. Delfino* (2005) 35 Cal.4th 180, 192; *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 737 (*Jarrow*) [section 425.16 "is a procedural device for screening out meritless claims"]; *Soukup, supra,* 39 Cal.4th at p. 278.)

"Section 425.16 posits . . . a two-step process for determining whether an action is a SLAPP. First, the court decides whether the defendant has made a threshold showing that the challenged cause of action is one arising from protected activity. . . . If the court finds that such a showing has been made, it must then determine whether the plaintiff has demonstrated a probability of prevailing on the claim." (*Navellier v. Sletten* (2002)

29 Cal.4th 82, 88 (*Navellier*).) "Only a cause of action that satisfies *both* prongs of the anti-SLAPP statute—i.e., that arises from protected speech or petitioning *and* lacks even minimal merit—is a SLAPP, subject to being stricken under the statute." (*Id*. at p. 89; *Soukup, supra*, 39 Cal.4th at p. 278.)

Because the "filing of lawsuits is an aspect of the First Amendment right of petition," and a malicious prosecution action, by definition, alleges that the defendant committed a tort by filing a lawsuit, there is no dispute that GZZ made the requisite threshold showing. (*Soukup, supra*, 39 Cal.4th at p. 291.) Our analysis will therefore focus on the second prong—whether Harris demonstrated a probability of prevailing on his malicious prosecution claim.

To establish a probability of prevailing, the plaintiff "must demonstrate that the complaint is both legally sufficient and supported by a sufficient prima facie showing of facts to sustain a favorable judgment if the evidence submitted by the plaintiff is credited." (*Matson v. Dvorak* (1995) 40 Cal.App.4th 539, 548.) The plaintiff need only establish that his or her claim has "minimal merit" to avoid being stricken as a SLAPP. (*Navellier, supra*, 29 Cal.4th at p. 89; *Jarrow, supra*, 31 Cal.4th at p. 738 ["the anti-SLAPP statute requires only 'a minimum level of legal sufficiency and triability' "]; *Soukup, supra*, 39 Cal.4th at p. 291.)

We review the trial court's rulings on an anti-SLAPP motion de novo, conducting an independent review of the entire record and applying the same standard governing the trial court's review of the motion. (*HMS Capital, Inc. v. Lawyers Title Co.* (2004) 118 Cal.App.4th 204, 212.) Thus, we consider "the pleadings, and supporting and opposing affidavits stating the facts upon which the liability or defense is based" (§ 425.16, subd. (b)(2)), but we do not weigh credibility or compare the weight of the evidence. Rather, we accept as true the evidence favorable to the plaintiff and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law. (*HMS Capital*, at p. 212; *Soukup, supra*, 39 Cal.4th at p. 269, fn. 3; *Flatley v. Mauro* (2006) 39 Cal.4th 299, 325-326.) Our charge is merely to

determine whether the plaintiff has made a prima facie showing that would warrant the claim going forward. (*HMS Capital*, at p. 212.)

2. *Harris's Action Is Not Barred by the Rule Precluding Malicious Prosecution Claims Arising Out of Family Law Proceedings*

As a threshold matter, GZZ contends Harris has no probability of prevailing on his malicious prosecution claim, regardless of its merits, because the claim is precluded by the rule barring malicious prosecution actions arising from unsuccessful family law motions or orders to show cause (OSC's). (See *Bidna v. Rosen* (1993) 19 Cal.App.4th 27, 37 (*Bidna*).) Harris counters that Linda's underlying cross-complaint did not arise from a family law motion or OSC, nor did Linda and GZZ prosecute it as part of the dissolution proceeding. Rather, Harris argues, Linda's cross-complaint was filed as a separate civil litigation action and, thus, does not implicate the policy considerations underpinning the *Bidna* rule. We agree with Harris that the rule does not preclude his malicious prosecution action.

The rule has its origins in what the *Bidna* court described as "an abiding judicial reluctance to entertain malicious prosecution actions which arise either out of motions or OSC's, or originate in family law proceedings." (*Bidna*, *supra*, 19 Cal.App.4th at p. 32.) *Bidna* involved a dissolution proceeding in which the wife repeatedly filed meritless motions and OSC's to change child custody after the court awarded the husband custody of their daughter. The wife's wealthy mother funded the motions in hopes of forcing the husband, through sheer attrition, to relinquish custody. The husband incurred over $200,000 in attorney's fees and costs to defend against the meritless filings. Making matters worse, the husband had no adequate family law remedy because the wife was effectively judgment-proof and her mother was not a party to the dissolution action. Accordingly, the husband filed a claim for malicious prosecution, which the trial court dismissed upon demurrer. (*Id.* at pp. 31-32.)

In affirming the judgment notwithstanding the egregiousness of the defendants' conduct, the *Bidna* court identified four policy grounds for an absolute bar of malicious prosecution claims based on any kind of family law motion or OSC. (*Bidna, supra,* 19 Cal.App.4th at pp. 34-35.) First, due to the bitterness inherent in many family law cases, the court recognized it could be "extremely difficult to distinguish truly 'malicious' motions and OSC's from ordinary ones." (*Id.* at p. 35.) Second, family law courts had the "unique ability to swiftly discourage litigious nonsense *at its source*" by imposing attorney's fees awards as sanctions against a party's conduct. (*Ibid*.) Third, allowing malicious prosecution actions might have a "chilling effect" on a party's ability to obtain family law remedies, which would be particularly hazardous in custody matters where the child's best interests are at stake. (*Ibid*.) Finally, the *Bidna* court noted "tangentially" that the availability of malicious prosecution actions would raise malpractice insurance premiums for family law lawyers. (*Id*. at pp. 35-36.)

Against these reasons, the *Bidna* court balanced the inadequacy of the remedies available to the husband under the facts of the case. (*Bidna*, *supra,* 19 Cal.App.4th at p. 37.) Despite the arguable inadequacy of family law remedies, the court decided that "no malicious prosecution action may arise out of unsuccessful family law motions or OSC's," citing as the "tie breaker" the "basic judicial policy in favor of curing the evil of abusive litigation at its source rather than allowing it to metastasize into yet more litigation." (*Ibid*.)

GZZ argues the rationale underpinning the *Bidna* rule "squarely fits" the circumstances surrounding Linda's cross-complaint, including the claims asserted against Harris. At most, however, its contention boils down to a single fact—that Linda's cross-complaint asserted claims affecting Linda's and Barry's interest in Stealth, a marital asset. That fact alone is not sufficient to convert an ordinary civil action into a family law dispute subject to the absolute bar articulated in *Bidna.*

Nicholson v. Fazeli (2003) 113 Cal.App.4th 1091 (*Nicholson*) is instructive. The case arose from a marital dissolution in which the husband and wife joined the husband's trust as a party. After a judgment of dissolution was entered, with the court retaining

jurisdiction over property division and spousal support, the wife filed a complaint against the trust in the dissolution action, claiming that the trust's assets were relevant to the determination of marital standard of living and spousal support. The trust in turn filed a cross-complaint in the dissolution action against the wife and husband, seeking possession of a car in the wife's possession and a constructive trust over several pieces of jewelry, including the wife's engagement ring. After an arbitration between the husband and wife, an arbitrator ruled that the car and the jewelry belonged to the wife. (*Id.* at pp. 1094-1095.) Having obtained a favorable determination of the trust's claims in the arbitration, the wife filed a malicious prosecution action against the trustees and the attorney who filed the cross-complaint on the trust's behalf. The trustees and attorney obtained a judgment of dismissal upon demurrer and a motion for judgment on the pleadings. (*Id.* at p. 1096.)

In the wife's ensuing appeal, the *Nicholson* court framed the "primary issue" as "whether a cross-complaint that originates in a dissolution action may form the basis for a malicious prosecution action." (*Nicholson, supra*, 113 Cal.App.4th at p. 1096.) After thoroughly analyzing the holding and rationale of *Bidna*, the *Nicholson* court concluded *Bidna's* " 'absolute bar' " should not extend to "otherwise ordinary civil pleadings alleging ordinary civil causes of action that, for whatever reason, 'originate in family law proceedings.' " (*Id.* at p. 1098.) Distinguishing the trust's cross-complaint from the family law motions and OSC's underlying the malicious prosecution claim in *Bidna*, the *Nicholson* court observed: "The cross-complaint . . . did not raise any family law issues. It did not involve marital status, child custody or spousal support. Though the characterization of the property in question as Trust property might have had some impact on the division of community property, the Trust did not seek to characterize the property as community or separate property but rather as Trust property. The Trust's action was simply a civil action for possession of property alleged to be trust property and damages for the loss of trust property. Had this same pleading been separately filed in the superior court, there would be no question that it could support a malicious prosecution action." (*Id.* at pp. 1098-1099.)

Here, as in *Nicholson*, the mere fact that marital property was implicated in Linda's cross-complaint does not convert an ordinary civil action into a family law dispute mandating application of *Bidna's* absolute bar. Unlike a motion or OSC brought in the context of a bitter family law dispute, Linda's claims against Harris are no more difficult to classify as malicious than any other civil action. Nor does the unique character of family law remedies warrant an absolute bar. On the contrary, Linda's action against Harris implicated none of those remedies and, instead, sought normal civil damages for alleged breaches of corporate fiduciary duties.[6] For much the same reason, *Bidna's* concern about "chilling" meritorious family law motions or OSC's is not implicated here. And, though GZZ filed Linda's cross-complaint, there is no reason that prosecuting her claims against Harris required the expertise of family law attorneys. Thus, permitting Harris's malicious prosecution action under the circumstances of this case will not have a broad effect on the malpractice premiums of family law attorneys. Because none of the reasons for *Bidna's* absolute bar apply to the circumstances of this case, we conclude the *Bidna* rule does not supply an adequate basis for reversing the trial court's order denying GZZ's anti-SLAPP motion.

3. *Harris Established a Probability of Prevailing on His Malicious Prosecution Claim; GZZ Had No Legally Tenable Basis to Assert Harris Owed Linda a Fiduciary Duty in His Capacity as Stealth's Corporate Counsel*

We turn now to whether Harris established a probability of prevailing on the merits of his malicious prosecution claim. (*Matson, supra,* 40 Cal.App.4th at p. 548.)

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[6] GZZ contends *S.A. v. Maiden* (2014) 229 Cal.App.4th 27 articulates a rationale for broadly applying the *Bidna* rule to any action originating in a family law proceeding, such as the instant case. We disagree. The underlying motion in *Maiden* was a request for a domestic violence restraining order, which, as the *Maiden* court observed, is authorized in "family law proceedings over which the family law divisions of the superior courts have jurisdiction." (*Id.* at p. 39.) This distinguished the relief sought in *Maiden* from the relief sought in *Nicholson*, which could have been obtained in an ordinary civil action. (*Id.* at pp. 39-40.)

In assessing whether a sufficient prima facie showing has been made, we evaluate the evidence in light of the proof necessary to prevail on the claim. (See *Soukup, supra*, 39 Cal.4th at p. 292.)

"To prevail on a malicious prosecution claim, the plaintiff must show that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination favorable to the plaintiff; (2) was brought without probable cause; and (3) was initiated with malice." (*Soukup, supra,* 39 Cal.4th at p. 292; *Sheldon Appel Co. v. Albert & Oliker* (1989) 47 Cal.3d 863, 871 (*Sheldon Appel*).) Here, the record establishes Linda voluntarily dismissed her cross-complaint against Harris, without receiving consideration, which can constitute a favorable termination. (See *Siebel v. Mittlesteadt* (2007) 41 Cal.4th 735, 743; *MacDonald v. Joslyn* (1969) 275 Cal.App.2d 282, 289 ["a voluntary dismissal, though expressly made 'without prejudice,' is a favorable termination which will support an action for malicious prosecution"]; *Lanz v. Goldstone* (2015) 243 Cal.App.4th 441, 462 ["the claims were in essence abandoned, and such abandonment can be favorable termination, as is generally held where a voluntary dismissal is filed"].)[7] Thus, we are concerned only with whether GZZ prosecuted the action without probable cause and with malice.

The question of probable cause concerns "whether, as an objective matter, the prior action was legally tenable or not." (*Sheldon Appel, supra,* 47 Cal.3d. at p. 868; *Soukup, supra,* 39 Cal.4th at p. 292.) "A litigant will lack probable cause for his action either if he relies upon facts which he has no reasonable cause to believe to be true, or if he seeks recovery upon a legal theory which is untenable under the facts known to him."

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[7] GZZ's reliance on *Weaver v. Superior Court* (1979) 95 Cal.App.3d 166 is misplaced. *Weaver* recognizes the general principle that "a dismissal result[ing] from negotiation, settlement, or consent" normally will not be regarded as a favorable termination because it "reflects ambiguously on the merits of the action." (*Id.* at pp. 184-185.) That principle is inapplicable here because there is no evidence that Harris negotiated with Linda for her dismissal. On the contrary, the record shows Harris was preparing to seek a dismissal on the merits by way of an anti-SLAPP motion or demurrer when GZZ filed the request for dismissal on Linda's behalf.

(*Sangster v. Paetkau* (1998) 68 Cal.App.4th 151, 164-165.) Further, "[t]he test in a malicious prosecution action is not whether defendant had reasonable grounds to seek some kind of relief in the original action; it is instead whether he had reasonable grounds for asserting the theory for relief contained in the complaint . . . . [C]ounsel for an unsuccessful plaintiff cannot shield himself from a malicious prosecution action by arguing that even if the only theory advanced in the complaint . . . was groundless and maliciously asserted, he nonetheless possessed some other undisclosed and unlitigated, but tenable, theory. He must stand or fall on the theory advanced and if that theory is one which he knows, or should know, is groundless and he nevertheless maliciously advances it, he must fall." (*Williams v. Coombs* (1986) 179 Cal.App.3d 626, 644, disapproved on another ground in *Sheldon Appel, supra,* 47 Cal.3d at p. 883, fn. 9; *Franklin Mint Co. v. Manatt, Phelps & Phillips, LLP* (2010) 184 Cal.App.4th 313, 349-350.) Moreover, probable cause must exist for every claim advanced in the underlying action. "[A]n action for malicious prosecution lies when but one of alternate theories of recovery is maliciously asserted." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 57, fn. 5; *Crowley v. Katleman* (1994) 8 Cal.4th 666, 679, 695; *Soukup,* at p. 292.)

"The 'malice' element . . . relates to the *subjective intent or purpose* with which the defendant acted in initiating the prior action. [Citation.] The motive of the defendant must have been something other than that of bringing a perceived guilty person to justice or the satisfaction in a civil action of some personal or financial purpose. [Citation.] The plaintiff must plead and prove actual ill will *or* some *improper* ulterior motive." (*Downey Venture v. LMI Ins. Co.* (1998) 66 Cal.App.4th 478, 494; *Soukup, supra,* 39 Cal.4th at p. 292.) Malice "may range anywhere from open hostility to indifference. [Citations.] Malice may also be inferred from the facts establishing lack of probable cause." (*Grindle v. Lorbeer* (1987) 196 Cal.App.3d 1461, 1465-1466; *Soukup,* at p. 292.)

In denying the anti-SLAPP motion, the trial court determined GZZ lacked probable cause to maintain the breach of fiduciary duty and negligent infliction of emotional distress claims because GZZ had no legally tenable basis to assert Harris owed Linda a legal duty based on the facts it might have reasonably believed at the time. While we agree with the trial court on both counts, we will focus exclusively on the breach of fiduciary duty cause of action.

The elements of a cause of action for breach of fiduciary duty are the existence of a fiduciary relationship, its breach, and damage proximately caused by that breach. (*City of Atascadero v. Merrill Lynch, Pierce, Fenner & Smith, Inc*. (1998) 68 Cal.App.4th 445, 483.) Whether a fiduciary duty exists is a question of law. (*Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1599.) The relation between attorney and client is a fiduciary relation of the very highest character. (*Pierce v. Lyman* (1991) 1 Cal.App.4th 1093, 1102.) "The predicate of an attorney's fiduciary obligations is the existence of an attorney-client relationship." (*Ibid.*)

Harris's evidence established that he never entered into an attorney-client relationship with Linda, and, hence, never owed her a fiduciary duty as a matter of law. Rather, as the Stealth board of directors (including Linda) resolved at its June 16, 2011 special meeting, Harris was the attorney for "the Corporation," and owed fiduciary obligations exclusively to Stealth. Though the resolution authorized Stealth's officers to communicate with Harris concerning the corporation's legal matters, that authorization did not establish separate attorney-client relationships between Harris and Stealth's individual officers, directors, or shareholders. The underlying principle is cogently explained in *Skarbrevik v. Cohen, England & Whitfield* (1991) 231 Cal.App.3d 692 (*Skarbrevik*).

In *Skarbrevik*, a minority shareholder in a closely held corporation brought an action against the corporation's attorney for professional negligence and conspiracy to defraud. (*Skarbrevik, supra,* 231 Cal.App.3d at p. 696.) The plaintiff was one of four equal shareholders in the corporation. The three other shareholders had grown dissatisfied with the plaintiff and, at the plaintiff's suggestion, entered negotiations to

purchase his shares. When those negotiations soured, the majority shareholders consulted the corporation's attorney to ask whether the corporation could issue them additional shares—a transaction that would predictably dilute the plaintiff's stock. The attorney advised the majority shareholders as to how this could be accomplished consistent with the corporation's bylaws. As a result of the corporate acts taken by the majority shareholders on the attorney's advice, the plaintiff's stock was diluted from a 25 percent to a 4.7 percent interest in the corporation. (*Id.* at pp. 697-700.) The plaintiff's claims against the attorney were tried to a jury, which returned a verdict finding the attorney liable for professional negligence. (*Id.* at p. 700.)

The *Skarbrevik* court reversed the judgment, concluding the issue of professional negligence should not have been submitted to the jury because the corporation's attorney did not owe a legal duty to the plaintiff. (*Skarbrevik*, *supra*, 231 Cal.App.3d at p. 700.) It was undisputed, as it is here, that no contractual attorney-client relationship existed between the plaintiff and the attorney. (*Id.* at p. 701.) Nevertheless, the plaintiff argued an implied legal duty should exist "based upon the relationship of an attorney for a close corporation to the corporation's stockholders." (*Id.* at p. 703.) The *Skarbrevik* court disagreed, explaining: "An attorney representing a corporation does not become the representative of its stockholders merely because the attorney's actions on behalf of the corporation also benefit the stockholders; as attorney for the corporation, counsel's first duty is to the corporation. [Citation.] Corporate counsel should, of course, refrain from taking part in any controversies or factional differences among shareholders as to control of the corporation, so that he or she can advise the corporation without bias or prejudice. [Citation.] Even where counsel for a closely held corporation treats the interests of the majority shareholders and the corporation interchangeably, it is the attorney-client relationship with the corporation that is paramount for purposes of upholding the attorney-client privilege against a minority shareholder's challenge. [Citation.] [The authorities] make clear that corporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders." (*Id.* at pp. 703-704.) Based on these

principles, the *Skarbrevik* court concluded the plaintiff had no attorney-client relationship with the corporation's attorney, and the fact that the attorney "could have foreseen the adverse consequences of his advice and its impact on plaintiff [was] not sufficient justification for fixing liability on him to a nonclient shareholder under [the] circumstances." (*Id.* at p. 707.)

Notwithstanding the legal principle articulate in *Skarbrevik*, GZZ contends it had a justified belief that Harris formed an attorney-client relationship with Linda based on an allegation made in Linda's verified answer to Barry's complaint.[8] Specifically, GZZ relies on the following statement from the verified answer concerning the June 16, 2011 special meeting: "When Linda attempted to leave the meeting, Linda is informed and believes that in furtherance of the plan and scheme, which included to replace Stealth's neutral corporate counsel . . . [,] Glenn Harris made misrepresentations including misrepresenting that he was representing her interests, concealing that he was representing the interest of Alon and/or Barry only, [and] that for her legal rights to be

[8] GZZ also contends *Skarbrevik* overstates the principle that corporate counsel owes a duty to the corporation, not its individual shareholders. In that regard, GZZ argues *Sprengel v. Zbylut* (2015) 241 Cal.App.4th 140 "demonstrates that this is an unsettled area of the law, thereby precluding Harris from demonstrating lack of probable cause." Contrary to GZZ's assertion, the *Sprengel* court expressly declined to address the issue, noting that the defendants' "arguments regarding the absence of an attorney-client relationship" concerned the probability of success prong of the anti-SLAPP analysis, while the trial court's denial of the defendants' motion had been properly based on the threshold determination that none of the plaintiffs' causes of action arose from protected activity. (*Id.* at pp. 156-157 & fn. 6 ["For the purposes of this decision, we need not decide whether the general rule described in . . . *Skarbrevik*, which involves the relationship between an attorney and a corporation, applies equally to the relationship between an attorney and a limited liability corporation . . . comprised of only two members who each own 50 percent of the enterprise"].) *Sprengel* does not suggest the legal rule stated in *Skarbrevik* is open to reasonable debate under the facts known to GZZ.

protected she needed to have her own separate counsel."[9] As Linda's attorneys, GZZ maintains it was justified in believing her version of these events, notwithstanding Harris's contrary representations. Thus, GZZ argues it had probable cause to assert the breach of fiduciary duty claim on Linda's behalf. There are two problems with this position.

First, Linda's assertion that Harris "misrepresent[ed] that he was representing her interests, [while] concealing that he was representing the interest of Alon and/or Barry only" is too ambiguous to determine what Harris actually said and whether his statements would have been sufficient to create an attorney-client relationship with Linda. It is not at all clear from Linda's vague allegation that Harris said anything other than that he was the corporation's attorney, as memorialized in the board minutes and resolution to the subject special meeting. While Linda may have interpreted that statement to mean Harris was "representing her interests" as well as those of Stealth's other shareholders, her mere belief that Harris's duties to the corporation extended to its shareholders is not enough to establish the requisite attorney-client relationship. An individual's "state[] of mind, unless *reasonably induced* by representations or conduct of [the attorney], [is] not sufficient to create the attorney-client relationship; [the individual] cannot establish [the relationship] unilaterally." (*Fox v. Pollack, supra,* 181 Cal.App.3d at p. 959, italics

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[9] GZZ cites an additional statement in Linda's verified form interrogatory responses; however, the statement largely undermines its position. Contrary to GZZ's assertion that Harris misrepresented the nature of his attorney-client relationship with Stealth, the subject interrogatory response states, regarding the special meeting: "Present were Linda, Baruch, Alon and Glenn Harris[,] a close personal friend of Alon Glickstein who was for the first time *identified to Linda as an attorney for the corporation*." (Italics added.) GZZ also cites several other allegations in Linda's verified answer that suggest Harris acted in a manner contrary to her interests. But these allegations merely beg the question, because none of the alleged conduct establishes the threshold charge that Harris owed a legal duty to Linda. (See *Skarbrevik, supra,* 231 Cal.App.3d at pp. 702-704, 707; see also *Fox v. Pollack* (1986) 181 Cal.App.3d 954, 961 ["an attorney has no duty to protect the interests of an adverse party [citations] for the obvious reasons that the adverse party is not the intended beneficiary of the attorney's services, and that the attorney's undivided loyalty belongs to the client."].)

added.) The allegation in Linda's verified answer is not sufficiently specific to permit an inference that Harris stated he was Linda's attorney, as opposed to the attorney for the corporation.

The second problem with GZZ's argument dovetails with the first. Consistent with what appears to have been Linda's belief about Harris's duty to Stealth's shareholders, the evidence shows GZZ likewise operated under the assumption that Harris owed a duty to Linda by dint of his attorney-client relationship with Stealth. Thus, in a series of emails between Harris and Ronald Ziff, in which Harris repeatedly reminded Ziff that he represented Stealth, and *not* the individual shareholders, Ziff twice asked Harris, "whether or not as counsel for Stealth you have a legal duty of any kind owed to Linda as a director or shareholder of Stealth." The trial court reasonably concluded based on these emails that GZZ asserted the breach of fiduciary claim against Harris based on GZZ's incorrect legal assumption that Harris's attorney-client relationship with Stealth extended to the corporation's individual directors and shareholders.[10] And, the trial court rightly determined based on this exchange that GZZ "did not conduct adequate research into the merits of whether Harris owes Linda Glickstein a duty before filing the cross-complaint." We agree with the trial court's assessment of the evidence and likewise conclude GZZ asserted the breach of fiduciary duty claim without probable cause.

Finally, with respect to the malice element, the evidence establishing GZZ asserted the breach of fiduciary duty claim without probable cause, if accepted as true, would also support a finding of malice. As noted above, malice "may range anywhere from open hostility to indifference." (*Grindle v. Lorbeer, supra,* 196 Cal.App.3d at p. 1465.) It "may also be inferred from the facts establishing lack of probable cause." (*Id.* at p. 1466.) Here, GZZ's apparent failure to adequately research the law pertaining

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[10] The operative allegations in Linda's cross-complaint substantiate that determination. There, GZZ alleged on behalf of Linda that "Glenn Harris owed a fiduciary duty to his client Stealth and as corporate counsel a duty to the shareholders . . . to treat them equally and without bias."

to the legal relationship between a corporate attorney and the corporation's individual shareholders and directors is sufficient evidence of indifference to support a malice finding. In denying GZZ's anti-SLAPP motion, the trial court properly determined that Harris met his burden of establishing a probability of success.

4. *GZZ Procedural Arguments Do Not Establish Grounds for Reversal*

GZZ asserts two procedural arguments which it contends mandate reversal of the order. Neither argument has merit.

GZZ argues its "rights would be unduly prejudiced if Harris were allowed to maintain his malicious prosecution action" because Stealth will not permit GZZ to invade the attorney-client privilege to discover whether Harris's termination was "solely due to the filing of Linda's cross-complaint, as opposed to his myriad of existing conflicts." There is authority for dismissing a malpractice claim where a defendant attorney cannot effectively defend the action without disclosing *relevant* privileged information. (See, e.g., *Solin v. O'Melveny & Myers, LLP* (2001) 89 Cal.App.4th 451, 462–463.) Here, the privileged information GZZ purportedly seeks to obtain is not relevant to any viable defense because GZZ's speculation that Harris had a "myriad of existing conflicts" stems from its flawed premise that he owed a legal duty to Stealth's individual shareholders. The trial court properly rejected this contention in concluding Harris's obligation to disclose a potential conflict arose only when he was named as a co-defendant and co-conspirator with Stealth in Linda's cross-complaint.

GZZ also argues the trial court committed reversible error by sustaining Harris's evidentiary objection to a declaration submitted by Linda in support of a motion to join Stealth as a party to the dissolution proceeding. The substance of the declaration with respect to Harris concerns work Harris performed on behalf of Stealth that, Linda maintained, benefitted Barry. The trial court did not abuse its discretion by sustaining Harris's objection on hearsay and relevance grounds because the facts presented in the declaration had no bearing on whether Harris owed a legal duty to Linda. We find no error.

DISPOSITION

The order denying GZZ's special motion to strike is affirmed. Harris is entitled to his costs.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

STRATTON, J. *

We concur:

ALDRICH, Acting P. J.

LAVIN, J.

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.